Testimony to the Labor & Public Employees Committee, Hartford, CT
Regarding House Bill 6594, An Act Concerning Non-Compete Agreements
February 7, 2023

Terri Gerstein
Director, State and Local Enforcement Project, Harvard Center for Labor and a Just Economy
Senior Fellow, Economic Policy Institute

To Senator Kushner, Representative Sanchez, Senator Sampson, Representative Ackert, and members of the Labor and Public Employees Committee,

Thank you for the opportunity to provide testimony regarding HB 6594. I provide this testimony in my personal capacity. I am the Director of the State and Local Enforcement Project at the Harvard Center for Labor and a Just Economy[1] and a Senior Fellow at the Economic Policy Institute.[2]

From 1999 through early 2017, I enforced workplace laws in New York, including as a Deputy Commissioner overseeing wage and hour enforcement in the New York State Department of Labor, and as Labor Bureau Chief in the New York State Office of the Attorney General (OAG). I became familiar with non-compete agreements ("non-competes") through several OAG investigations, and I have researched and written about them since leaving government.[1]

Our OAG non-compete cases involved employers in a range of industries, including the Jimmy John's sandwich chain,[2] Law 360[3] (the legal news website), and Examination Management Services, Inc. (EMSI),[4] a national medical information services company. After I left the office, the OAG handled more non-compete cases, including one involving a payment processing firm[5] and a joint case (with the Illinois Attorney General's Office) involving the shared work-space company WeWork.[6]

Economists have documented employers' extensive use of non-competes even where they're unenforceable; the lack of bargaining that typically precedes employees signing; and non-competes' adverse impact on job mobility and wages. Many harmful effects of non-competes are less readily calculable. Numbers don't convey what it means for a newly-minted journalist or a hard-working janitor to be stuck in a job they don't like, only because they fear they'll be sued if they get a new job. And we don't know how many workers continue to experience workplace violations, like discrimination, harassment, or wage theft, because a non-compete makes them feel they can't leave. By allowing someone's boss to stop them from getting a new and better job in their field, non-competes can have a profound impact on a person's life. For example, the worker in our EMSI case was a phlebotomist who traveled throughout the state drawing blood for prospective insurance policyholders. Her employer used her non-compete to try to block her from a new job requiring far less travel, allowing more time at home.

[1] https://clje.law.harvard.edu/
[2] https://www.epi.org/

In over two decades of enforcing and studying workplace laws, I have repeatedly seen the stark disparity of bargaining power[7] that leads workers to sign non-compete agreements, whether they're fair or enforceable or not.

HB 6594 will curb some of the most harmful use of non-competes. However, the proposal does not go as far as it ideally should, in two key ways: the proposal is too narrow in its coverage, and it does not include a private right of action (although this may have been a drafting oversight).

First, as you are likely aware, the Federal Trade Commission (FTC) last month proposed a prohibition on virtually all non-competes, except in very narrow situations (such as a partner's sale of a business). The FTC notably did not limit this ban only to low or middle-income workers, based on non-competes' considerable harm to all workers and to the economy as a whole.

In permitting non-competes for a significant portion of workers, HB 6594 would make meaningful progress, but the bill does not adequately address the powerful evidence laid out by the FTC supporting an all-out prohibition.

At the very least, a Connecticut non-compete law should set a significantly higher threshold below which non-competes would be categorically prohibited. HB6594 covers only those earning up to three times the state minimum wage, which is currently $14 per hour, slated to rise to $15 later this year. If we annualize three times the post-increase minimum wage ($45/hour x 40 hours/week x 52 weeks), it works out to $93,600. Several jurisdictions that have passed laws limiting non-competes have used much higher thresholds; for example, the threshold is $150,000 in Washington, D.C.[8] and $116,000 in Washington state.[9] Connecticut should use a threshold that is more in line with these other states, ideally at the higher end. This would require either using an annual salary as the threshold (such as $150,000, as in Washington, D.C.), or selecting a higher multiplier of the state minimum wage, such as four or five times the state minimum wage, which annualized post-increase would land in the $125,000-$150,000 range.

Second, HB 6594 does not include a private right of action allowing workers to bring a lawsuit challenging an unlawful noncompete. Instead, the bill permits enforcement against violative employers only by the state attorney general. This may have been a drafting oversight, but if unremedied, it would be a major deficiency: non-competes are widespread, even where they have been deemed void, and strong enforcement is needed to prevent employer overreach and abuse. Government enforcement resources, including at the state attorney general's office, are limited. An explicit private right of action is needed to make the law real in the lives of Connecticut workers and to prevent employers from using non-competes with impunity. It would also be profoundly unfair to omit a private right of action: employers may sue (or threaten to sue) in court to enforce non-compete clauses, while workers would not have their own independent access to that same forum.

House Bill 6594 contains several very important features.

1) **HB 6594 prohibits unnecessary and inappropriate non-competes**, rather than merely rendering them unenforceable. This is critical. If disallowed non-competes are merely unenforceable, employers have little disincentive for including them. The employer's worst-case scenario is that a court doesn't uphold the non-compete; meanwhile, the employer has benefitted from the non-compete's chilling effect on employees. Moreover, most employers want to follow the law. Making coercive and inappropriate non-competes *prohibited* rather than just *unenforceable* conveys a normative signal and provides clear guidance that overreach should not be attempted.

2) **HB 6594 protects the workers who need it most.** One additional protection by HB6594 is that it prohibits use of non-competes for workers covered by the state minimum wage law and overtime laws (most notably, those who are not subject to the executive, administrative, professional exemption). HB 6594 laudably also protects independent contractors.

3) **HB 6594 increases fairness in relation to those non-competes that are permitted.** It requires advance notice to workers, as well as payment of workers while they are covered by non-compete agreements (also known as "garden leave"). Garden leave is also beneficial as it requires employers to seriously consider whether they truly need a non-compete, or whether a less restrictive alternative would allow them to meet the same goals.

4) **HB 6594 allows for penalties for violations**, which are critical for deterring violations.

Finally, some technical notes: First, the bill has an effective date in July of 2023 and is silent regarding the validity of non-competes already existing on that day. This may have the unintended consequence of causing an upsurge of employers requiring non-competes in the lead-up to the effective date. It may be advisable to declare non-competes existing prior to the effective date void or unenforceable, in relation to workers for whom the bill categorically prohibits them (those under the salary threshold and non-exempt from the minimum wage and overtime laws). This approach would avoid unwelcome unintended consequences and affect only the most inappropriate existing non-competes. Second, there appears to be some language missing from Section 4(2)(e) of the bill as drafted.[3]

Overall, HB 6594 would protect many workers of Connecticut from the harms caused by non-compete agreements and would enhance workers' freedom to change jobs. It would diminish abusive use of such covenants. But the bill should go further: it should prohibit more non-competes than it currently does, and it should include a private right of action to provide meaningful enforcement opportunities for workers. Thank you.

[3] I believe that the bolded language should be added: "If a court or an arbitrator determines that **an employer has requested or required a worker to sign or agree to** a covenant not to compete or an exclusivity agreement in **violation of** sections 1 to 3, inclusive, of this act, the violator shall be liable for (1) the aggrieved worker's actual damages, or (2) a penalty of five thousand dollars, whichever is greater, in addition to reasonable attorney's fees, expenses and court costs."

[1]https://www.nbcnews.com/think/opinion/noncompete-agreements-allow-bosses-chain-workers-their-jobs-we-need-ncna1114031; https://www.teenvogue.com/story/noncompete-clauses-what-are; https://www.epi.org/blog/welcome-developments-on-limiting-non-compete-agreements-a-growing-consensus-leads-to-new-state-laws-a-possible-ftc-rule-making-and-a-strong-bipartisan-senate-bill/; *"Sign on the Dotted Line": How Coercive Employment Contracts Are Bringing Back the Lochner Era and What We Can Do About It,* (co-author Jane Flanagan), University of San Francisco Law Review, 54 U.S.F. L. Rev. 441 (2020).

[2] https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete

[3] https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-major-legal-news-website-law360-stop-using

[4] https://ag.ny.gov/press-release/2016/ag-schneiderman-agreement-ends-non-compete-agreements-employees-national-medical

[5] https://ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-payment-processing-firm-end-use-non-compete

[6] https://ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-wework-end-use-overly-broad-non-competes

[7] https://www.epi.org/unequalpower/home/

[8] https://code.dccouncil.gov/us/dc/council/laws/24-175

[9] https://lni.wa.gov/workers-rights/workplace-policies/non-compete-agreements